

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3
4 TQ DELTA LLC, : CA NO. 13-1835-RGA,
5 : 13-1386-RGA
6 Plaintiff, : 13-2013-RGA
7 :
8 v. : May 5, 2015
9 :
10 2WIRE INC, ZHONE :
11 TECHNOLOGIES INC, & ZyXEL :
12 COMMUNICATIONS INC., et al., :
13 :
14 Defendants. : 11:03 O'clock a.m.
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18 TRANSCRIPT OF STATUS CONFERENCE
19 BEFORE THE HONORABLE RICHARD G. ANDREWS
20 UNITED STATES DISTRICT JUDGE
21
22

23 APPEARANCES:

24
25 For Plaintiff: FARNAN LLP

1 BY: MICHAEL E. FARNAN, ESQ

2 -and-

3 MCANDREWS, HELD & MALLOY

4 BY: PETER J. MCANDREWS, ESQ

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7 For Defendants: MORGAN, LEWIS & BOCKIUS

8 BY: JODY BARILLARE, ESQ

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10 PROCTOR HEYMAN

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14 MORRIS JAMES LLP

15 BY: MARY MATTERER, ESQ.

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10 Court Reporter: LEONARD A. DIBBS

11 Official Court Reporter

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1 P R O C E E D I N G S

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3 (The proceedings commenced at 11:04 o'clock a.m. as
4 follows:)

5 THE COURT: Please be seated.

6 So we have a status conference in TQ Delta v. 2Wire,
7 Zhone and ZyXEL.

8 Mr. Farnan, who have you got with you?

9 MR. FARNAN: Peter McAndrews from McAndrews, Held &
10 Malloy.

11 THE COURT: Good morning.

12 MR. MCANDREWS: Good morning, your Honor.

13 THE COURT: And Mr. Green?

14 MR. GREEN: James Day.

15 THE COURT: All right.

16 And where are you from, sir?

17 MR. DAY: I'm now with Farella, Braun & Martel.

18 THE COURT: That's in San Francisco?

19 MR. DAY: San Francisco, yes.

20 THE COURT: Okay. Ms. Matterer?

21 MS. MATTERER: Good morning, your Honor.

22 I have with me Elizabeth Rader from Alston & Bird.

23 THE COURT: All right.

24 And Mr. Barillare.

25 MR. BARILLARE: Good morning, your Honor.

1 Jody Barillare from Morgan Lewis for 2Wire.

2 On the phone is my co-counsel, Brett Schuman, from
3 Proctor Heyman.

4 THE COURT: Good morning, Mr Schuman.

5 MR. SCHUMAN: Good morning, your Honor.

6 THE COURT: Well, I guess you can hear me.

7 Okay. So I got these letters. And, so, I guess I had
8 a question on what seemed like maybe the easier stuff.

9 So one of the plaintiffs' complaints is that they've
10 done some interrogatories, asking for the names of witnesses
11 with knowledge, and apparently defendants have not provided the
12 names of any witnesses with knowledge.

13 Because this is a status conference, I didn't get the
14 usual back and for the letters, so I don't know what the
15 defendants' response to this might be.

16 I would be interested in hearing what it is.

17 MR. DAY: Well, your Honor, James Day for Zhone.

18 Maybe I'll take the lead just on that point.

19 The first point, your Honor, is you didn't get back and
20 forth on it, because it was raised with you before it was raised
21 with us. This was an issue that was not raised with the
22 defendants. There was no meet-and-confer, which I just wanted
23 to point out --

24 THE COURT: No, no, you --

25 MR. DAY: -- I know it's not the appropriate way to do

1 this.

2 THE COURT: I hear you. Go ahead.

3 MR. DAY: I would add, at least for Zhone, we
4 identified witnesses in our initial disclosures back in October,
5 so I think the suggestion that this has somehow slowed down
6 anything, I think is incorrect. The witnesses were identified a
7 long time ago.

8 THE COURT: Even though I gather, without having
9 actually having looked at any interrogatories, the
10 interrogatories were probably more trying to focus on which
11 witnesses had information about particular interrogatories as
12 opposed to just generally who are the witnesses?

13 MR. DAY: I'm not sure that -- well, I think what I
14 think is, the interrogatories that I believe the letter is
15 taking about are the ones that led to our non-infringement
16 positions that we set out.

17 So it's how our products work and what do we know about
18 them?

19 Those are the witnesses that we identified in initial
20 disclosures a long time ago. I don't think that these
21 interrogatories are looking for something more particular than
22 that.

23 THE COURT: Well, I don't know. Mr. McAndrew seems to
24 think it was worth bringing up as a Complaint.

25 Mr. McAndrew, what am I missing here?

1 MR. MCANDREWS: Your Honor, so -- and I apologize to
2 the extent that an additional meet-and-confer would have been
3 required here.

4 The procedural posture, as we see it, though, is that
5 you actually -- you know, we had this meet-and-confer four
6 months ago, and at the last meeting you ordered the parties to
7 provide full answers to the extent they had knowledge to these
8 interrogatories, and they chose not to answer that party
9 interrogatory.

10 THE COURT: Well, so we're just talking about the more
11 specific thing here.

12 You had did some interrogatories that apparently, am I
13 correct, requested witnesses with knowledge of the answers of
14 the particular interrogatory?

15 MR. MCANDREWS: That's correct, your Honor.

16 THE COURT: Okay.

17 MR. MCANDREWS: And --

18 THE COURT: And, so, did they provide -- what is it
19 exactly that you want that you don't have?

20 MR. MCANDREWS: So it is true that for some of the
21 defendants -- and Mr. Day may have been speaking only for Zhone
22 -- in that where they did their initial disclosures, we might be
23 able to identify from the initial disclosures, based on the
24 category of information, the witness with knowledgeable. We
25 might be able to identify witnesses that at least at that time,

1 you know, which was far earlier in time, would have been
2 knowledgeable of this topic.

3 THE COURT: Okay. Am I correct in deducing what it is
4 you're looking for is, you're trying to identify witnesses with
5 the particular topics that are in particular interrogatories?

6 MR. MCANDREWS: That's correct, your Honor.

7 THE COURT: Okay. So taking in -- bearing in mind --
8 and I'm not, in any way, criticizing anyone, because this has
9 just arisen in a different format than these things usually
10 arise in -- but it would seem to me that that's something that
11 you could discuss, and that at least so far as I can see, the
12 defendants ought to be, if there is an interrogatory asking for
13 witnesses who can provide the basis for knowledge of a
14 particular interrogatory, it ought to be answered, but, you
15 know, you all can talk about it yourself.

16 I assume then that probably the same discussion would
17 be had about the document request that you raised in your
18 letter?

19 MR. MCANDREWS: That's correct, your Honor.

20 THE COURT: Okay. All right.

21 So, you know, just generally, but I don't have the -- I
22 don't have a written admission from you, and I shouldn't have a
23 written submission from you, and perhaps this particularly thing
24 could have been discussed more -- but I think you ought to -- it
25 sounds to me like the plaintiff has legitimate concern, and you

1 ought to see if you can't work that out between yourselves.

2 All right.

3 So that was, as I said, what I thought might be the
4 low-hanging fruit here.

5 What I was inclined to do was, it seems to me that it's
6 probably time for the defendant to pony up with some invalidity
7 contentions, and how much time do the defendants need to do
8 this?

9 MR. DAY: Your Honor, before we get to that, maybe we
10 should step back a little.

11 At the end of the last hearing, the very last thing you
12 said was, we're not going to do invalidity contentions until we
13 do some narrowing on the case.

14 THE COURT: I guess I'm thinking differently about it
15 right now, but go ahead.

16 MR. DAY: So I want to -- let's talk a little bit about
17 how we got to where we are, and what's been going on.

18 A year ago the defendants narrowed their case down --

19 THE COURT: Right.

20 MR. DAY: -- to 32 patents in nine families, 64 claims,
21 so that was the narrowing a year ago.

22 THE COURT: Right.

23 MR. DAY: After that we produced core-technical
24 documents on more than a hundred accused products, and then we
25 got infringement contentions.

1 And you'll recall in September we had a discussion
2 about those, where we, the defendants, explained why we thought
3 those really were not adequate, because what they do, you'll
4 recall, is take the claims --

5 THE COURT: Right. They mapped them to the standards.

6 MR. DAY: -- and mapped them onto standards. They
7 don't say anything about the accused products, even though we
8 had produced our documents.

9 So what we came out of that hearing with was, you said,
10 okay, well, I'm a getting to allow infringement discovery.

11 And the plaintiffs said, okay, we're going to go out
12 and we'll take third-party discovery, and we'll, you know --

13 THE COURT: Right, and then they changed their minds.

14 MR. DAY: They did.

15 So then we -- they said, well, what we really need is
16 list a name of all the chips in all these accused products.

17 THE COURT: Right. This is what you said in your
18 letter. I read it.

19 MR. DAY: Right. And we gave them that.

20 Then they came in and said, now what we need are your
21 non-infringement positions.

22 And, so, we gave them Zhone, this, you know, stack of
23 paper, 63 charts, detailed charts, hundreds of thousands of
24 dollars in charts to explain to them our positions in response
25 to what they had given us last year.

1 That's where we are today.

2 In each of the last few status conferences, we've been
3 talking about ways to narrow the case down. That's why we've
4 been giving them all of this information. We gave them summary
5 damages data, so they could use that to try to focus in on some
6 of the particular products.

7 And, in each of these hearings, we've talked about the
8 enormous burden of doing invalidity contentions on 32 patents,
9 all with potentially different priority dates, so potentially
10 different prior art, certainly nine families that are all going
11 to have different prior art.

12 THE COURT: But here's the thing is, you know, I think
13 I have a fair amount of discretion to force narrowing of the
14 case, and I exercised that a year ago, at least in part.

15 And the question of how many products they accuse, you
16 know, that's a different issue, but they've got 32 patents, and
17 as you've said, they have a different priority dates for this
18 and that. Presumably they claim different things.

19 I'm not really sure that I have so much discretion to
20 say, without them even knowing what your invalidity positions
21 are, okay, we'll start dropping patents entirely.

22 And, so, that's kind of -- you know, I'm not saying
23 that the only thing that should be happening here is you should
24 be filing invalidity contentions, but I think it's time, I think
25 it's time for you to be doing that.

1 And, yes, maybe we'll narrow this down in some way --
2 we're going to have to -- but it seems that to me at least
3 before they have to start picking among the patents, and the
4 asserted claims, at least that part, I think they need to know
5 what your invalidity theories are that might affect which ones
6 they pick, right?

7 MR. DAY: Your Honor, I don't think that that's right.
8 I think they've talked about -- we've talked about the overlap
9 in the various different families.

10 And, so, I think at most, if we were to pick one claim
11 per family, and tell them what our invalidity positions were,
12 that would give them enough information on each of the families
13 to move ahead.

14 So I think that the burden doesn't justify going in
15 that direction. I think if we are going to go in that
16 direction, and you seem to have -- that seems to be where we're
17 headed -- then I think giving them our position on one claim in
18 each of the families would be sufficient to give them an idea of
19 where they are vulnerable, or where they're strong, or whatever
20 they are going to take from that.

21 And, at the same time, I think we should be moving
22 towards infringement contentions that tell us what it is in our
23 products that they think actually infringes.

24 So, if we're going to be put to the burden of these
25 invalidity contentions, I think that, you know, we ought to be

1 narrowing the case at the same time, or the process ought to be
2 leading toward narrowing the case.

3 THE COURT: You actually bring up something that I was
4 thinking about when I was reading the letters.

5 What are your accused products?

6 MR. DAY: DSL modems. So there's pieces -- for Zhone
7 anyway -- it's pieces that fit in what's called the central
8 office. Something like AT&T might have in a central hub been.
9 And then DSL modems that sit on top of your TV. DSL is a way to
10 get internet over a telephone line.

11 THE COURT: Okay. So, yes, DSL is the only thing I
12 actually recognize in what you just said.

13 So you make pieces of, or you presumably sell pieces of
14 equipment that somehow allow people like AT&T to send stuff over
15 the telephone lines to the world?

16 MR. DAY: To AT&T DSL subscribers. So I call AT&T and
17 say, I want to have a DSL modem in my house to get internet
18 connectivity, and they have a central place where they've got
19 sort of a computer-type thing that sends out these DSL signals
20 over the telephone lines.

21 I plug my DSL modem into my telephone line, and when
22 they turn me on, now my house has a DSL signal that is coming
23 from AT&T to my set top box.

24 THE COURT: And, so, is your accused thing something
25 that is in the AT&T home office, or is it something that's in

1 the consumer's home, or both?

2 MR. DAY: For Zhone it's both. That's not true of all
3 the defendants, but for Zhone we sell both.

4 And the way these things work, and we've talked about
5 this a little bit in the past is, we order from third-party
6 vendors, the DSL chip.

7 THE COURT: Right, right, I've heard that part.

8 MR. DAY: So we're not actually building these things
9 from scratch. We're doing the assembling and sending them out
10 to the consumer or AT&T.

11 To answer your question, Zhone sells both the central
12 office piece, and what's called the consumer premises equipment
13 piece.

14 THE COURT: And, so, these hundreds products that are
15 accused, are they different generations of basically the same
16 thing, or how do you get to having so many different accused
17 products?

18 MR. DAY: It's a combination of multiple generations
19 and just changes in product line.

20 There are actually -- I haven't counted them -- but
21 many of the products use the same DSL chip. In fact, I think
22 we've determined that many of each of the defendants' products
23 use similar or the same chips.

24 So I don't -- I don't, frankly, know the total number,
25 if we were to get down to a representative number.

1 THE COURT: So what I was trying to do was just figure
2 out whether -- you know, how related they are to each other, and
3 it sounds to me like there's some degree of heavy relatedness,
4 if one is, you know, 15X modem, and the next one is the 15.2
5 modem or --

6 MR. DAY: No. There are a hundred, if you count them
7 up, and that would be one line item. The 15X, the 15X1 is one
8 line item, and there about a hundred line items, roughly, of
9 that nature.

10 Now, there may be an overlap between the first line
11 item and the second, they may use the same DSL chip which would
12 be for purposes of this case, would make them closely related,
13 but they are different products.

14 And then there's a significant difference between the
15 piece that sits in the consumer's premises, and the piece that
16 sits in the central offices.

17 I'm not sure I'm answering your question.

18 THE COURT: Well, you're in the right ballpark.

19 Mr. McAndrew, do you have anything to say?

20 MR. MCANDREWS: No, I mean that's generally correct.

21 These products are -- I mean, as a baseline, they are
22 all very related given that they all practice the DSL standards,
23 right?

24 So at a baseline they're exceedingly related to each
25 other, but then it is true that there are going to be multiple

1 generations, and then within those generations you're going to
2 have different models, depending on potentially a different
3 feature set.

4 And the feature set, you know, it may have two bells
5 and whistles, or three and four bells and whistles, and
6 depending on how many of those will impact which patent families
7 are in play for that particular product.

8 But, overall, we agree. In fact, we proposed in the
9 original Scheduling Order that the parties should be able to
10 work out a way to agree on the representative products.

11 THE COURT: Right. I've been hearing that for a long
12 time and apparently no progress has been made.

13 MR. MCANDREWS: That's correct, your Honor.

14 But this is the first time this letter here -- actually
15 when I saw it was the first time that I had seen the defendants
16 seem to agree to that proposal.

17 And, in fact, they proposed several ways in which we
18 could agree, and, so I was actually very encourage by this
19 particular paragraph about representative products.

20 As long as the understanding is that we're talking
21 about representative products, not I'm eliminating my claim
22 against anything that I don't call a representative product.

23 In other words --

24 THE COURT: Right.

25 MR. MCANDREWS: -- that product would represent the

1 other ones that are not going to be in play in front of the jury
2 and your Honor for pretrial matters.

3 And, so, the defendants would have to agree that this
4 product is representative of this class of products, whether
5 it's because it's a generational thing, or because it's the
6 same, even though there are four bells and whistles in this one,
7 and this one has two, two are the same across models.

8 So I think there is a way to do that, and I think that
9 would be a positive step forward, to take the next possibly
10 three weeks to try to agree on representative products.

11 As far as representative claims go, your Honor -- and I
12 appreciate, because I had mentioned that it would be difficult
13 for us to reduce further from 64, if we didn't yet know an
14 invalidity position. At the same time, I do understand that
15 given that there is overlap in the patents, I don't think it's
16 an unreasonable suggestion, actually, to do invalidity
17 contentions on fewer than 64 claims.

18 I don't think one claim for each patent family would do
19 the trick, but some number between 64 and I guess they are
20 suggesting nine per, you know, one --

21 THE COURT: So how would you -- what would you -- make
22 a suggestion.

23 MR. MCANDREWS: I would suggest that we pick at least
24 two patents from each family, and some -- I think there might be
25 at least one family with only one patent, so that's an easy one.

1 And then they would do an invalidity contention on -- typically,
2 we have two claims asserted per patent, you know, that's the
3 average that we wound up with. And there will be a dependent
4 claim in that, and, of course, the dependent claim, the purposes
5 of that is initial insulation against prior art.

6 So we would suggest -- so I guess I'm suggesting
7 approximately four claims per family with the exception of the
8 family that has only one patent in it.

9 THE COURT: Four times nine is 36?

10 MR. MCANDREWS: Correct.

11 MR. DAY: Your Honor, the goal here is to narrow down
12 the case, so we're necessarily going to be doing work that is
13 going to be thrown away.

14 That's the point of what we're going to do, so doing
15 more is not efficient, and it continues to put all the burden on
16 the defendants who borne all of the burden for the last year.

17 One per family?

18 And if there's some concern there, perhaps we can
19 meet-and-confer about two in a family, if there are two patent
20 claims that are so different that the plaintiffs think they need
21 an extra claim.

22 But we've heard, and I think it's true, there's
23 significant overlap in the claims they've chosen in each patent
24 family, and I think one claim per is going to tell them all they
25 need to know about where they are vulnerable.

1 And, you know, you could have sort of a safety valve.
2 If they come to you and show good cause why they need two in a
3 particular family, we could respond to the specific request,
4 give you enough information to make a decision, or we could
5 meet-and-confer and agree on it, perhaps, I don't know, but the
6 safety valve would be you let them come to you and show you good
7 cause.

8 MR. MCANDREWS: Your Honor, I think maybe he
9 misunderstood what I was agreeing to, actually.

10 What I thought he was suggesting was that they would do
11 claim charts initially, you know, avoid the burden of doing
12 charts on 64 claims, and then we would decide which claims we
13 would go forward in the case on, because that creates the
14 problem that I was -- that I believe you recognized, that if I
15 have to select which claims ahead of time, then I may be giving
16 up on claims that would have better insulation against the prior
17 art.

18 And, so, what I was suggesting is that they do a
19 smaller set of invalidity contentions, and then from that we can
20 determine what the representative claims are, and I don't think
21 it would be a burden.

22 So, for example --

23 THE COURT: Is that correct?

24 I'm sorry, Mr. Day.

25 MR. DAY: That's correct.

1 THE COURT: Under your suggestion, Mr. McAndrew, who
2 would pick the ones that they were doing the infringement
3 contentions on -- I mean the invalidity contentions?

4 MR. MCANDREWS: The invalidity contentions.

5 The first time through, I suppose that they -- they
6 could pick.

7 So, if we're going to do this, they do representative
8 invalidity contentions, and then we can determine from that
9 which claims we want to go forward as representative claims in
10 the case.

11 And, again, we're talking about representative claims.
12 We're not talking about eliminating patents from the case, I
13 believe. We're talking about this claim or these two claims
14 that's going to be representative of these six patents in the
15 family. And we will agree that the case rises and falls for
16 that patent family on those claims.

17 THE COURT: I'm sorry. I've lost track of your timing
18 because you were just saying it --

19 MR. MCANDREWS: I'm sorry. I'm just trying to clarify
20 the issue of what representative means. It doesn't mean that
21 I'm eliminating all those additional claims from the case. I'm
22 just agreeing that I'm going to try the case for a particular
23 patent family on the claims that we determine are
24 representative.

25 MR. DAY: The --

1 THE COURT: Hold on a second, Mr. Day.

2 I'm sorry, Mr. McAndrew, there was something about the
3 timing, which is, your proposal is somebody, let's say says,
4 this is your proposal, as I understand it. They do invalidity
5 contentions on approximately 36 of the asserted claims.

6 And then, after that, you would be proposing to them
7 some subset as representative claims?

8 MR. MCANDREWS: Correct, with the possible substitution
9 of a claim that they didn't yet do a chart on, and understand
10 that -- you know, so what they might say is, well, we've bore
11 the burden of doing an invalidity contention on this claim, and
12 now you're telling me that this claim is at issue.

13 But, as we both agreed, there is substantial overlap,
14 and, so, they may be looking at one additional claim element,
15 for example.

16 THE COURT: All right. I understand that.

17 Mr. Day?

18 MR. DAY: Okay. I was not suggesting something
19 different, your Honor. In an approach, I was suggesting
20 something different just in the -- among in the goal, but just
21 in big steps.

22 THE COURT: Well, I --

23 MR. DAY: I understand we're all on the same page.

24 THE COURT: Okay.

25 MR. DAY: But what I was suggesting specifically is,

1 they can pick nine claims --

2 THE COURT: Actually, I have to say, I was thinking
3 that they should pick, because they are the ones who are going
4 to be making a decision on the basis of it, so you probably know
5 which ones you'd like -- it doesn't make sense that you pick
6 which -- however many we're talking about -- that you pick them?

7 MR. MCANDREWS: I suppose it does.

8 MR. DAY: And what we would suggest is they pick one
9 claim from each family. They can pick the one they think is
10 going to be most informative, for us to provide them one
11 invalidity -- one set of invalidity contentions on that one
12 claim, for that one family, a total of nine.

13 And what I was saying is, if one for a family is not
14 sufficient for them to be informed of our invalidity
15 contentions, if they don't think that's going to work, if they
16 need ten, they can make some particularized showing to say, no,
17 no, no, we actually need ten invalidity contentions from you.

18 THE COURT: All right.

19 So let me propose this.

20 (Pause)

21 Well, first off, let me go back.

22 Mr. McAndrew, when you were talking about picking
23 representative claims, are you talking about, essentially, one
24 per patent family?

25 MR. MCANDREWS: I was thinking, potentially, as many as

1 four claims per patent family.

2 THE COURT: Okay. So I don't want it to look like I'm
3 just splitting the baby here, but it seems to me, just listening
4 to you, and having read this, and considering what Mr. McAndrew
5 has said, what seems to me to be a reasonable thing would be
6 that Mr. McAndrew pick two claims per patent family, so that's
7 18 total.

8 And I say "two per patent family." If, for some reason
9 or other, there's one he's particularly interested in, he wants
10 to go three on that, and one on some other, but a total of 18
11 which -- which are not presumptively, but the ones that will
12 give Mr. McAndrew the best -- in his judgment -- the best
13 information to be able to make intelligent decisions as to which
14 ones he would like to have as a representative claim.

15 And that the idea would be that there would be no more
16 than, you know, absent some really good reason, no more than two
17 representative claims per patent family.

18 Would that work? Would that be reasonable?

19 MR. DAY: I think it's less reasonable than nine
20 claims, your Honor, and I frankly -- I don't believe that they
21 need two per family, because the claims are similar enough.

22 THE COURT: But if that's the case, then, in fact, it's
23 going to be a very marginal amount of extra effort on your part
24 to do the second one per family, right?

25 MR. DAY: Potentially, it depends on which -- if they

1 pick two that are very, very similar, true. If they pick one
2 take raises a Section 101 patentability problems, written
3 description problems, enablement problems.

4 For instance, if they pick two that are based on
5 somewhat different specifications, then it's just double the
6 work.

7 THE COURT: Okay. But, I mean, if it is double the
8 work, then it's because they have some reason to believe that,
9 you know, maybe picking too closely related ones is not in their
10 best interest.

11 MR. DAY: Potentially.

12 THE COURT: So I hear what you're saying.

13 Mr. McAndrew?

14 MR. MCANDREWS: Your Honor, I think we can live with
15 18. There is -- we've -- we've -- I think there's a tacit
16 agreement here that there are nine patent families. I believe
17 there's at least one family where the relatedness is not as much
18 as it might be in the other family, so I'm on little concerned
19 with 18. That family might -- may merit an additional two, but
20 I can either ask for those two now, or come back to you.

21 THE COURT: Well, I'll tell you what.

22 I'm in no position to possibly make an intelligent
23 decision, so why don't we -- so what I'd like to do is to say,
24 pick 18, you can discuss with all the defendants whether this
25 other patent family has sufficiently disparate claims, or

1 patents, or whatever the case may be. You know, you can
2 meet-and-confer on that and hopefully reach some resolution.

3 If it is really the case -- you know, if it is the case
4 that they really are, for whatever reason, quite different from
5 each other, you know, it seems reasonable to me. And after all,
6 a half hour ago I was going to make you do them all, so I think
7 that would be a reasonable way to proceed. And that's the way
8 that I'd like to proceed.

9 In terms of picking your 18, possibly plus two, how
10 much time do you think you need to do that, Mr. McAndrews?

11 MR. MCANDREWS: Two weeks maximum.

12 THE COURT: Okay. I know we haven't made much progress
13 here, but give yourself enough time, and if two weeks is enough,
14 that's fine.

15 Mr. Day, or Ms. Rader, or anybody, Mr. Schuman, if you
16 are still there, how much time -- I mean, I guess this is
17 actually -- how much do each of the defendants need to provide
18 invalidity contentions based on Mr. McAndrew picking his 18 to
19 20 claims, two weeks from now?

20 MR. DAY: Your Honor, we haven't had a chance to
21 discuss that, obviously, and I can't speak for the other
22 defendants.

23 Does anybody want to shout out a number?

24 MR. SCHUMAN: Your Honor, this is Brett Schuman for
25 2Wire.

1 I want to answer the Court's question quickly, but I
2 just want to point out 2Wire case has fewer patent families.
3 Only six.

4 And, so, I assume under the structure that the Court
5 has been discussing with Mr. McAndrews and Mr. Day, that's 12
6 claims, two per family.

7 As the Court said, if there is some family where you
8 need three, then you go one with the other family, is that
9 correct?

10 THE COURT: Well, actually, what I said was -- well,
11 first off, I tend to think that, yes, you're talking about
12 working as a starting point from 12 for 2Wire based on the fact
13 that there are only six asserted patent families against you.

14 What I think I said was, Mr. McAndrew, if, in his own
15 judgment wants to designate three from one, and one from
16 another, that's all right, it's okay, but it's also the case
17 that if you -- and I don't know whether his patent family with
18 many strange relatives in it is one of the ones that is asserted
19 against 2Wire -- but if he also wants to do two per family, and
20 try to convince you that you should get three or four on this
21 other family -- on this family with the odd relatives -- that's
22 all right, too.

23 But, basically, what I would be talking about in terms
24 of 2Wire is 12 claims, possibly 13 or 14, depending on
25 discussions you would have between yourselves.

1 MR. SCHUMAN: Okay. Fair enough. I appreciate the
2 Court's clarification there, and I'm sure -- I don't think the
3 family with the odd relations in it is against 2Wire, but we can
4 meet-and-confer with Mr. McAndrews about that, and I'm
5 optimistic we can clarify that.

6 So, I think, your Honor, 75 days to do those charts for
7 2Wire?

8 THE COURT: All right.

9 I hear you, Mr. Schuman.

10 Do the other defendants have something they want to
11 say?

12 MR. DAY: Yes, your Honor. I guess I look at this as
13 we're looking at invalidity contentions in an 18 patent case at
14 this point, and, so, we need a fair amount of time to do these,
15 a little more than Mr. Schuman, because we're going to have a
16 third more.

17 I was thinking more like a 120 days.

18 THE COURT: Ms. Rader?

19 MS. RADER: My argument last time we were here, I think
20 so, I agree with that, I mean, a 120 days sounds reasonable.

21 THE COURT: Mr. McAndrew -- or, actually, I'm sorry --
22 it's Mr. McAndrews. Sorry.

23 MR. MCANDREWS: Thank you, your Honor.

24 I can't argue over -- I was going to suggest a hundred
25 days, but --

1 THE COURT: All right.

2 Well, since you can't argue over it, a 120 days. So
3 that's a 120 days from, essentially, the two week -- whenever it
4 is that Mr. McAndrews identifies the patents -- the claims for
5 your client that he's interested in.

6 And then, if there is some discussion about the patent
7 family that apparently doesn't involve 2Wire, then you should
8 talk about that, you know, in the first week or two to try to
9 figure that out, and see if you can't reach an agreement on
10 that, but while you're talking about that, you'll have the other
11 12 -- the other 18 -- and you can certainly get going.

12 MR. DAY: Understood, your Honor.

13 One point I want to try to be clear on, is that these
14 are preliminary contentions.

15 THE COURT: They are preliminary.

16 And, so -- and so that -- so the 120 days plus two
17 weeks, so that's nearly a 140 days.

18 And, so, under what we're talking about here, after you
19 provide these contentions, which I take it will probably take a
20 little bit of time to digest by Mr. McAndrews and his team,
21 he'll be proposing some representative claims; is that right?

22 MR. MCANDREWS: Yes, your Honor.

23 THE COURT: All right.

24 Do you have a sense, you know, and the further we get
25 into the future, the hazier the estimates might be, but once you

1 get these invalidity contentions, what's your estimate as to how
2 long it will take for you to analyze them, and make your
3 reasoned decisions as to a proposal as to representative claims?

4 MR. MCANDREWS: 30 days I think would be adequate.

5 THE COURT: All right.

6 And I'm asking this, because I don't know the answer --
7 and I haven't really thought about it before -- if Mr. McAndrews
8 proposes representative claims, are the -- the defendants are
9 probably -- I guess what I'm wondering is, if he says, I'd like
10 these to be the representative claims, how much of an
11 opportunity do the defendants have, or does it make any sense
12 even that they would say, no, those are not good representative
13 claims, or is it pretty much whatever he says, that's what it's
14 going to be?

15 MR. DAY: That's a good point, your Honor, and I was
16 thinking about -- I actually thought about that last night.

17 It occurred in me that they have accused some of our
18 products that we know cannot possibly infringe.

19 And, so, if they say -- if they pick a representative
20 product -- the first step would be to tell us the representative
21 product, then give us the --

22 THE COURT: Well, actually, the first thing we're doing
23 is representative claims, which is not necessarily the same
24 thing as the representative products, right?

25 MR. DAY: I'm sorry. I skipped ahead of you.

1 So you're saying if they pick representative claims, do
2 we have any input into that?

3 THE COURT: Right.

4 MR. DAY: I don't think so. Yes, we -- I think if an
5 issue comes up, we would raise it with you, but in advance of
6 seeing what they are, it's hard for me to know.

7 THE COURT: It's kind of like asserting claims. They
8 get to pick which claims that they assert.

9 And, as a representative claim, it seems to me the only
10 thing would be -- because I think -- I think what I'm getting
11 from what Mr. McAndrews said is that, essentially, as a
12 representative claim, the idea would be if the jury decides that
13 a particular product infringes a representative claim, at least
14 from a damages perspective, all of the related claims are going
15 to, therefore, be treated as infringed, is that right, Mr.
16 McAndrews?

17 MR. MCANDREWS: That's correct, your Honor.

18 THE COURT: Okay.

19 MR. DAY: So, in that case, absolutely, your Honor, we
20 should be -- you know, if they say Claim A, with, you know,
21 three elements is representative, and every other claim they
22 want that to represent has four elements, we would not agree
23 that proving up the -- you know, the narrowest claim is
24 representative of the broader claims on an infringement issue.

25 That wouldn't make sense and that would violate our due

1 process rights, frankly, so we would have to have input on that.

2 If --

3 THE COURT: Well, okay. That's the reason I bring it
4 up, because, I mean, it's not like I know what the answers are.

5 MR. DAY: Yes, yes. No, I -- I hadn't thought of that
6 before. That to me is the answer to the question.

7 They can pick whatever they want. If that's going to
8 apply to other claims, then I think we'd have to have input and
9 explain why we either agree or don't agree.

10 THE COURT: In other words -- I think I understand what
11 you're saying and maybe this is something that's just a topic
12 for another day, or maybe even ideally a topic that you resolve
13 between yourselves -- but depending on what they would pick as a
14 representative claim, it may be, essentially -- I mean,
15 presumably, you're not picking as a representative claim, and
16 saying, well, anything that has the identical elements, it is,
17 therefore, representative of, because then, in fact, it's going
18 to be representative of nothing, unless I guess we have double
19 patenting going on here, right?

20 So it has to be -- if it's going to be representative,
21 and it's, you know, an independent claim in one of these
22 patents, that is probably a much better candidate to be
23 representative than if it is, as you say, the narrowest
24 dependent claim that they can find.

25 On the other hand, the broader the claim, the more

1 likely you might have some prior art or something else that
2 makes it a dubious claim, right?

3 MR. DAY: That's all true, your Honor.

4 Frankly, I think that you're -- and we'll
5 meet-and-confer, and we'll do whatever you say -- but I think,
6 frankly, trying to come up with a scheme for representative
7 claims is going to be a lot of trouble, and difficult to get to
8 any sort of resolution, and the better approach is to limit the
9 number of claims in the case.

10 THE COURT: But one of the things that I do recall --
11 you know, I tend to forget, as you can tell, most of these
12 conferences from one time to the next -- but one of the things
13 that I do recall is Mr. McAndrews saying in the first conference
14 -- and now that I've said I recall it, I'm probably going to
15 misstate it horribly -- but he said something about part of the
16 reason that they have so many claims in asserted patents is -- I
17 believe he used the word "stacking" -- to talk about his damages
18 theory, or maybe it was your brother, for all I know.

19 MR. MCANDREWS: No, your Honor, it was me.

20 THE COURT: And, so, one of the things that's
21 problematic about doing things that knock entire patents out of
22 the case is sort of dependent on whether that's going to affect
23 the damages theory, right?

24 MR. DAY: I don't think that's right. I also don't
25 think -- I think you have authority to set the number of claims,

1 and it can be smaller than the total number of the patents in
2 the case. We've given you some case law that -- where the
3 Federal Circuit has approved that.

4 THE COURT: Well, I thought they approved -- I mean, I
5 didn't read it, if you cited it in here -- but if it's the Katz,
6 I mean, I read that a long time ago. I think it says I can
7 narrow claims. I don't think that it necessarily was dealing
8 with something where I was just telling them to toss entire
9 patents.

10 MR. DAY: In Katz there were 31 patents at issue.

11 The Court said, we're going to narrow the case down to
12 16 claims.

13 THE COURT: Mm-hmm.

14 MR. DAY: So you have the authority to do it. What you
15 need to do, per Katz and the other cases, is allow them to show
16 good cause why they need to add a claim back in.

17 But I think that approach is going to probably to get
18 us -- is going to be more effective than trying to come up with
19 them picking a claim that is representative of any other claim,
20 because I'm going to want them to prove up their case against my
21 client. I'm not going to want to just concede the case against
22 my client, really, on any claims.

23 THE COURT: All right.

24 So, maybe the best thing to do here -- but you tell me
25 if -- just to kick the can down the road here, and not get to

1 far ahead of ourselves -- and, so... but Mr. McAndrews, do you
2 have anything to say?

3 MR. MCANDREWS: Well, I mean, so it sounds like we're
4 making some significant progress towards narrowing the case
5 based on Mr. Days statement that he believes it would violate
6 their due process rights to reach an agreement on a reasonable
7 way to narrow the case.

8 I think that proceeding down a path where they provide
9 invalidity contentions on fewer than all the claims is going to
10 be just another way to delay the case further. I think we're
11 back at -- we need invalidity contentions on 64 claims then.

12 The problem is that defendants -- and this is -- and
13 I'll go back to what I said the first time around -- and the
14 analogy, your Honor, that you used is, we're sending a bunch of
15 soldiers across the field, and I only need a couple of them to
16 get to the fort on the other side.

17 And what I explained back is, under a damage theory
18 that the defendants raised in standard and central cases, they
19 argued that there's a royalty stack that they are subject to, by
20 having to comply with the standard, and, therefore, that royalty
21 stack needs to be taken into consideration when setting a
22 royalty rate.

23 And one way the court have done that is, they've looked
24 at the number of patents that are at issue in the case, you
25 know, part of the portfolio that was hypothetically being

1 licensed, and then the other patents that are not involved in
2 the case that allegedly is part of the royalty stack.

3 Now, that theory hasn't, you know, since we were last
4 here, that theory hasn't gotten a lot of legs, but it's still
5 there, and I don't hear the defendants agreeing that that's not
6 going to be a theory.

7 The Katz case, undoubtedly, involved a situation that
8 was not standard and central claims where the royalty stacking
9 argument was not, you know, while it may have been raised, it
10 wasn't something the courts latched on to at the time.

11 Also, since the last time we were here, there was an
12 Ericsson case that came out of Texas, and it the went through
13 the Federal Circuit. And while the Federal Circuit reversed, in
14 general, the Federal Circuit agreed that a royalty stacking
15 instruction to a jury is not necessary in an instance where
16 royalty stacking is not shown to be an issue in the case.

17 And I do believe it's the case where the defendants are
18 not going to be able to a show a royalty stacking. I think it's
19 highly unlikely that any of the defendants are paying any
20 royalties at all for the DSL products.

21 But, in any event, unless they are willing to give up
22 that theory at this stage, I can't give up my due process rights
23 for my client and eliminate patents from the case.

24 MR. DAY: So, your Honor, this is all hypothetical when
25 Mr. McAndrews, as the defendants, have raised these things.

1 He's talking in a general sense in other cases that has been
2 raised. It's all hypothetical for our case, and we haven't
3 gotten anywhere near talking about damages yet.

4 THE COURT: Well, that's true.

5 MR. DAY: But I think we don't -- you know, if you want
6 us to go to go ahead with invalidity contentions, we can do that
7 as we've discussed. I think probably you are right that if
8 figuring out the way to narrow the number of claims can come as
9 the next step, once we get to 135 days from now, or whatever it
10 is.

11 I think if we want to narrow the case, we'll give them
12 the invalidity contentions, they can use that same amount of
13 time to come up with infringement contentions on the same 18
14 claims. I suspect when they do that -- and I said this last
15 September, I continue to believe this is true -- if they
16 actually try to map the claims to our products, the patents will
17 fall out of this case, and products will fall out of this case.

18 They've got all the information we've given them over
19 the last year. The discovery on infringement has been open for
20 seven months. It remains open as far as I know.

21 They can go out, and they can create charts that say,
22 here's a claim element, here's your product, and here's where
23 that element exists.

24 Then we'll have the information we need to move forward
25 in the case, they'll have our invalidity contentions, so they

1 can move forward in the case, both sides will have information
2 to then talk about what are the claims we're going to go forward
3 on, and what are the products that we're going to go forward on,
4 because that's going to be -- those are the two next steps.

5 So, if we're going to make the next three or four
6 months productive, let's make it productive on both sides.

7 THE COURT: I also take it that part of the discussion
8 of products is that, in fact, getting representative products,
9 if we think that the issue is based or relates to the DSL chips
10 and the products, why the products use the same chips.

11 That whatever our disagreements about representative
12 claims are, and due process and such, it should actually be
13 possible to, without anybody claiming their rights are being
14 violated, to narrow down the products, right?

15 MR. DAY: I believe so.

16 MR. MCANDREWS: Yes, your Honor.

17 THE COURT: All right.

18 MR. DAY: But, your Honor, again, we need to know what
19 the contentions are to do that.

20 THE COURT: Yes, yes, I'm not saying right now, but it
21 seems to me that -- all right.

22 So, let's go ahead with these invalidity contentions
23 according to the schedule and, you know, part of what we'll be
24 doing -- and that includes Mr. McAndrews suggesting
25 representative claims, which will, you know, 30 days afterwards

1 without us having decided exactly what they mean -- but I think
2 for at least for my part, hopefully, somewhere down the road,
3 it's more concrete the discussion gets, the more I might
4 actually be able to make some reasonable decision about
5 something.

6 And, so, right now it's a lot more theoretical for me
7 than it is for anybody else in the room.

8 All right.

9 So, Mr. Day, you might have packed something into that
10 last little bit.

11 What is it that you would -- well, actually, before we
12 get to you.

13 So I think I kind of addressed -- I've addressed most
14 of your concerns in your letter, right?

15 MR. MCANDREWS: Yes, your Honor, with one exception.

16 THE COURT: Which is?

17 MR. MCANDREWS: That relates in part to something that
18 Mr. Day just said.

19 THE COURT: Okay.

20 MR. MCANDREWS: So, one thing that we pointed out is
21 that the defendants, at least two of the defendants that
22 actually provided some -- in some way a substantive response,
23 uniformly what you would see, if you went through their
24 invalidity contentions in every single element of the claim they
25 say, we don't know. They begin with, we don't know. We have no

1 idea how our products work, but then, occasionally, they're
2 selectively experts on the topic.

3 THE COURT: Well, so I saw that, and that's one of
4 those things when I see that my reaction is, what do you want me
5 to do about that?

6 MR. MCANDREWS: Nothing, other than to understand the
7 reason why we are where -- we are where we are in the case. The
8 defendants want to continue to complain that we haven't told
9 them why we believe they infringe.

10 You know, these are initial infringement charts, and
11 they want to continue to say that we haven't satisfied our
12 obligation under the local rule.

13 And I think your Honor agreed with us months ago that
14 that's not the case, but I just want to make sure that the
15 record isn't an indication --

16 THE COURT: Right, and I'm not sure that I agreed with
17 you. I don't know what I may have said. Whatever I said is on
18 the record somewhere.

19 But go ahead.

20 MR. MCANDREWS: Okay. But the problem we face is, I
21 believe the defendants know a great deal about the way their
22 products work, but what they would like to do is like to thrust
23 us upon these third parties in a Rule 45 situation where we're
24 going to have limited ability to follow up and get the discovery
25 we may need.

1 THE COURT: Well, and, so that's part of the reason
2 why, because you asked for, you know, provide us with documents,
3 provide us with people with knowledge.

4 I mean, at some point you're going to have to go to the
5 third parties, you're going to have to depose their people, and
6 find out what it is they know, right?

7 MR. MCANDREWS: Correct, your Honor, but because we're
8 in a Rule 45 situation, and I think under the way the rules have
9 been rewritten, you may be in charge of that. And I hope that's
10 the case, because you'll be in the best position to know why it
11 is that we've got this potential burden on a third party, but as
12 often happens in these types of cases, we'll go to a third
13 party, and he'll say we're not a defendant, we're not going to
14 disclose information, or to the extent we do, you'll get four
15 hours of deposition to figure out, you know, these 22 chips and
16 how they work.

17 So what we were hoping to do is to narrow the number of
18 issues that we need to take to the third party, then with the
19 understanding that the amount of discovery we need of a third
20 party may be larger than a typical case.

21 In any event, we -- so what I would propose is that we
22 learn what the knowledge of the witnesses are, learn what
23 documents they relied on for substantive information that was
24 provided, so in a case where Mr. Day says, I can promise you,
25 there's no way we infringe, I don't know how that can be given

1 that they say they don't know how their products work. And, so,
2 whatever information they have, I would like to learn what that
3 is.

4 Then there's -- so there will be a time where we go
5 take the third party depositions, and I hope -- you know, it
6 shouldn't be too far in the future, if we can quickly get
7 through the party depositions that I'd like to take.

8 In addition to that, we have testing going on, so since
9 the last time we were in -- and we understand that, you know,
10 the defendants are claiming they don't know. To the extent they
11 don't know, and the third party is going to make it very hard
12 for us to learn through the third party, we have gone out at
13 great expense and started -- started to test the products.

14 And I can say that there are instances where the
15 defendants are saying, the portion of the standard that you
16 pointed to is not mandatory, it's optional, and we don't
17 practice that optional portion of the standard.

18 We have learned that that is not true, and, so, some of
19 the discovery I'd like to take is to figure out why we have this
20 disparity.

21 THE COURT: All right.

22 What are you asking me? Is there a request there, or
23 are you just educating me, or what?

24 MR. MCANDREWS: I'm just trying to -- I'm trying to
25 educate you to the extent that Mr. Day is going to suggest

1 something other than proceeding with discovery, in an ordinary
2 course, where we would take depositions of the parties.

3 THE COURT: All right.

4 MR. DAY: May I, your Honor?

5 THE COURT: Yes, go ahead and educate me, too.

6 MR. DAY: I think you understand the issue. We've
7 talked about it now a number of times.

8 THE COURT: Yes, don't assume that I understand what
9 the issue is.

10 MR. DAY: All the things, other than the point about
11 testing, all of the arguments you just heard are precisely the
12 same arguments you heard last September about why the plaintiffs
13 couldn't give us reasonable charts, and, so -- what we consider
14 to be reasonable charts that identify anything in our products.

15 If you recall, there's not a single citation to a
16 single document from Zhone in these charts.

17 THE COURT: Well --

18 MR. DAY: And --

19 THE COURT: -- leaving that aside, one of the things
20 that I think you said in your letter -- and I was just curious
21 whether Mr. McAndrews would actually agree with this -- the
22 infringement contentions, did you say they don't actually even
23 reference your product like in --

24 MR. DAY: There --

25 THE COURT: -- or was it just, they say, here's the

1 accused products, here's the standard, blah, blah, blah?

2 MR. DAY: So there's a chart that lists accused
3 products, a list of a hundred families, and it says, Chart 1
4 shows how these infringe, and then the chart doesn't mention any
5 Zhone product.

6 So, it's not fair to say that they don't even mention
7 the products. They do.

8 The chart doesn't do anything to compare claim elements
9 to our products. It compares only to the standards. There's
10 absolutely no -- there's not a single Zhone document, or a
11 single reference to a Zhone document in the charts.

12 THE COURT: When you say in product literature, or
13 wherever you say it, that we comply with a particular standard,
14 part of the -- part of an issue is the standard might have
15 mandatory elements, it might have discretionary, or recommended
16 elements, non-mandatory elements -- presumably, if you say you
17 comply with it, that means anything that is a mandatory element
18 you should meet, right?

19 MR. DAY: Right.

20 THE COURT: And, so, the -- if the patent -- and, so,
21 if the infringement chart maps the claim to a mandatory element,
22 isn't that pretty good?

23 MR. DAY: So, really, there's two issues.

24 There's a mandatory versus optional, and we pointed out
25 in our charts with specificity where we think requirements are

1 optional, so now they know that.

2 They have not pointed out that any of the requirements
3 are, in fact, mandatory, so there's an issue there.

4 Is it mandatory or not?

5 And we don't know their position on that.

6 In some cases that would be enough, your Honor, but
7 what happens in a lot of the cases is, the standard doesn't say
8 you have to have an X, a Y, and a Z.

9 We talked about a hypothetical last September where you
10 have a phone, and the standard might say, you need a means for
11 dialing a number.

12 THE COURT: Okay.

13 MR. DAY: And the patent might say, you need a rotary
14 with ten numbers on it.

15 So you can say -- so you can comply with the standard
16 without having a rotary dialer on your phone. So even though
17 it's a mandatory requirement, and even though that claim is
18 similar, you're not infringing just because you comply with the
19 mandatory piece of the standard. That was the hypothetical we
20 talked about.

21 So, in fact, no, your Honor, just because something is
22 mandatory, and just because you comply, doesn't mean you
23 infringe the patent.

24 What the Fujitsu case talked about is, you've got to
25 show it's mandatory, and you've got to show that every way that

1 you can meet the standard would infringe.

2 THE COURT: Well, that was a discussion I had in this
3 case.

4 MR. DAY: Yes, last September.

5 THE COURT: Okay. I remember that discussion, but I
6 didn't remember who it was with.

7 MR. DAY: It was last September, your Honor.

8 And the point I wanted to make on this general topic,
9 your Honor is, we're hearing the exact same arguments that we
10 heard last September. We don't know third party discovery to
11 take and it's going to be difficult to do. The defendants are
12 lying to us about what they know. I think it's just false, it's
13 baseless, and it's incorrect. Those are the same arguments that
14 we heard last September.

15 If we want to move the case forward, I think, your
16 Honor, you have to set a date when we're going to get
17 infringement charts that map claims to products, show where the
18 elements are in the products, not just what we have today, and
19 it's not going to happen, your Honor, unless you set a deadline
20 for it.

21 I think we've got the next 140 days or something.
22 They've got all of the information that we've given them over
23 last year. There is no outstanding discovery right now, there's
24 no complaints about what Zhong has given to the plaintiffs,
25 other than a few names and documents that we'll give them,

1 there's nothing preventing them from -- if they want more
2 discovery, they can take it. Infringement discovery has been
3 open for seven months. They ought to be able to do it right
4 now, your Honor, but let's -- if they need --

5 THE COURT: All right.

6 MR. DAY: -- four months, give it to them.

7 THE COURT: What do you have to say about that, Mr.
8 McAndrews?

9 MR. MCANDREWS: Well, he's suggesting that we've had
10 information for the last year or more. We've only had their
11 non-infringement contentions for 30 days now.

12 Now we understand some of -- you know, so it's not
13 enough for a defendant to say, I don't know how my product
14 works. That's not a defense. If I have -- if I can show by a
15 preponderance of the evidence that their product infringes, I
16 can show that they say they're standard compliant, and it's a
17 mandatory portion of the standard. That should be enough.

18 I'm not sure what he's talking about elements that are
19 mandatory, and yet there's a rotary dial. I'm not aware of any
20 argument that they've made that is an analogy to that one.

21 THE COURT: Well, I mean, it seems like the argument
22 that's going on back and forth is -- is that your infringement
23 contentions, they say are quite general, because they map to the
24 standards, some part of the standards, and, you know apparently
25 for a lot of reasons it's not clear -- it's not clear to me just

1 how good your contentions are right now.

2 They then -- and, you know, I tried to look at some of
3 these things that were attached to the letters. It's hard for
4 me to wade through all the boilerplate.

5 But it seemed as though they're also not interested in
6 doing anything to help you get more specific, and they say --
7 and, you know, I tend to believe what lawyers say, as long as,
8 you know, it's not some conflict that you can't both be telling
9 me the truth.

10 You know, they say, we don't know how the chips work,
11 maybe they know some things, but they don't know all things,
12 and, you know, you -- when they get around to naming some
13 people, you can find out, by talking to people, whether they
14 know more or less what they said, or a little bit more, or maybe
15 even a little bit less, but whatever they know.

16 And, so, the impression I get is that the contentions,
17 and the non-infringement contentions, they are not opposing each
18 other real closely just yet, and, so, that's what Mr. Day is
19 saying is much -- I think what he's saying in so many words is,
20 no, when push comes to shove -- and I don't know whether they
21 would actually do this -- is, if all you have is what you've
22 done so far, you can't -- you can't win.

23 Now, I understand what I've heard you say, which is,
24 yes, I think I can give it a pretty good shot with the
25 representations they're making, and the standards, and maybe --

1 maybe I don't even have to do any of this testing, and maybe I
2 don't have to take third party discovery, you know, I've got a
3 triable case, or I will have a triable case just with what I
4 have, you know, and I think as between the two parties, that if
5 somebody has to submit or amend contentions, it's going to be
6 you in the first instance.

7 I'm not -- so I have that general impression, but I
8 also have the impression that if you had to amend the
9 contentions today, you couldn't say much more than you've
10 already said, is that right?

11 MR. MCANDREWS: Well, so, there's some ways now that I
12 can respond.

13 So, for example, if the defendant has said this element
14 claim is not mandatory, I can respond to that, and point to a
15 portion directly -- probably even in the chart that I've -- the
16 very chart that I provided them where it says "shall," and shall
17 is the buzz word in the standard for it's mandatory.

18 So I suppose I could respond and say, you're wrong, it
19 is mandatory, shall appears in these four places.

20 That's one way in which, I believe that their charts
21 have advanced the case in which -- you know, and if that's a way
22 to advance the case, I can provide that sort of response.

23 In some instances where they say, we don't know, or,
24 it's standard optional, and we don't do it, or we don't know if
25 we do it, I may, in short order, have testing information to

1 show otherwise, and I suppose I could provide --

2 THE COURT: I'm sorry. You know, I was just thinking.

3 I mean, in the end, what this is boiling down to, I
4 think is the defendants are saying that at some point -- and
5 they're suggesting the point is now -- that you actually need to
6 have whatever the accused products are mapped to the claims, and
7 I guess that is what we were probably discussing back in
8 September.

9 And I guess in a way -- and I kind of recall -- I mean
10 we were talking -- I think it was this was case, because this
11 would be the only case it could have been -- you know,
12 eventually in terms of proof, and I guess Fujitsu, how much you
13 rely on the standards to prove your case.

14 That's one thing.

15 The question is, in terms of the contentions, whether
16 it wouldn't be -- whether it wouldn't advance the case for you
17 to have, you know, infringement contentions, modem 15X, you
18 know, has a transceiver, here's a picture of the transceiver,
19 and actually match it against the claims, because there's this
20 layer of obscurity by having it mapped against the standard.

21 I mean, actually -- and I hate to be incredibly dense
22 -- but that's really what you've been saying all along is, you
23 would just like to have it mapped against the claims?

24 MR. DAY: Yes.

25 MR. MCANDREWS: Well, for example, the standard dose

1 say you have a transceiver. It's mandatory. But the elements
2 --

3 THE COURT: Well, right, but, in other words the --
4 maybe for infringement contentions you have to say, you have a
5 transceiver, because here's -- and we know that because here's a
6 diagram of your phone, and because you say you practice the
7 standard, and the standard says you have to have a transceiver.

8 I mean, there are a lot of different things you could
9 offer in support of that, right?

10 MR. MCANDREWS: Well, yes, but the primary one would be
11 the standard itself that calls out transceiver as the
12 fundamental units that are communicating with each other.

13 And, so, I guess what I'm wondering -- and maybe this
14 didn't really -- do you know, either of you, is there a Judge
15 you the out there who has -- you know, someone will tell me
16 you've cited five cases in your letter -- is there a Judge out
17 there who has said that you actually have to -- that essentially
18 in terms of contentions, what the plaintiff has done is
19 insufficient?

20 MR. DAY: No, your Honor. I think you asked the same
21 question last September, and I think we both conceded that
22 Fujitsu is at the summary judgment stage.

23 THE COURT: Okay.

24 MR. DAY: And I haven't found a case since then that's
25 talking about the contention stage.

1 THE COURT: Okay.

2 MR. DAY: I would say, though, your Honor, we're sort
3 of past the initial contentions, you know, they've set up their
4 initial contentions. We thought they were inadequate.

5 But, I mean, we're a year past that, we've conducted
6 infringement discovery for seven months.

7 What I'm saying is, if we want to narrow the case down,
8 if we want to eventually particular pick representative claims,
9 we've got to know what it is they're accusing, what transceiver
10 are they talking about?

11 If we do that, we'll be able to say, oh, yes, okay,
12 well, that transceiver is the same in multiple products. Now we
13 can join the issues.

14 They haven't done that.

15 You know, they have accused products where we don't
16 think there is a transceiver. They must be thinking of
17 something else that we don't think is a transceiver.

18 Until they tell me what they are talking about, we
19 can't join the issues, and I think we're going to have serious
20 problems really narrowing down.

21 That's the next logical step, your Honor.

22 And we've jumped through every hoop they've asked us to
23 jump through for seven months, eight months. It's time to put a
24 date on the calendar when they are going to update their charts,
25 and tell us what they are accusing, what it is in our products

1 they are accusing.

2 THE COURT: Well, I don't mind -- and I hear Mr.
3 McAndrews saying in a kind of not very specific way that, yes,
4 he could do some updating of the charts, even though I think the
5 updating he has in mind probably isn't updating that would
6 impress you at all as being helpful.

7 MR. DAY: Your Honor, I think if you put a date on the
8 calendar, he will go and take third party discovery and the case
9 will advance.

10 THE COURT: I guess what I'm wondering is, you know, I
11 can put dates on the calendar, but what is it exactly that you
12 would have me order him to do by this date?

13 MR. DAY: Identify where, in each accused product, each
14 element of each claim is found or practiced, what's the
15 structure, what's the function he's accusing in the products.

16 THE COURT: And, so, in essence what you're saying is,
17 no more mapping to the claims -- I mean, no more mapping to the
18 standard, map to the claims?

19 MR. DAY: Yes.

20 THE COURT: Okay.

21 Mr. McAndrews, what do you have to say about that?

22 MR. MCANDREWS: So no more mapping to the standard,
23 you're suggesting that we then map it to the product, and, as
24 Fujitsu says, it's -- mapping to the standard is the same as --
25 quote -- "It's the same as mapping to the product, when you show

1 that the product is complaint with the standard."

2 And that would be a mandatory situation that we can as
3 though in many instances, and in a --

4 THE COURT: Well, right, but --

5 MR. MCANDREWS: -- but in the optional steps --

6 THE COURT: -- I think maybe this is the discussion
7 that we've had before, and I feel kind of -- because I don't
8 remember these discussions, but presumably somebody is busy
9 reading the transcripts of these things before you come here, so
10 that you all can remember them, or maybe you have better
11 memories -- but it's like you've done half of that.

12 You've said, here's the standard, you know, here's the
13 claim and here's the standard, but you haven't done the standard
14 to the product portion, right?

15 Isn't that kind of -- Fujitsu is like a triangle, and
16 you've just don't one side of the triangle?

17 MR. MCANDREWS: Except that Fujitsu did not require the
18 patent owner to prove that the product complies with the
19 standard, where the standard section that is at issue is
20 mandatory, and the product purports data sheets, marketing
21 literature, purports to comply with the standard.

22 The whole reason -- I mean, the reason they have these
23 standards, they have to be -- and they're exceedingly detailed.
24 If you get one bit wrong in your communication that the other
25 side doesn't understand, it doesn't work.

1 The standards are very specific about what the product
2 has to do, can't do, or if they do it. So even in a standard
3 optional situation, if they do that option, they have to do it
4 the way the standard calls for.

5 Otherwise, these systems would break down. It's the
6 reason why we have multiple defendants in the room here, because
7 all their products can talk to each other. That's the whole
8 reason why Fujitsu said that if -- if you will purport to comply
9 with the standard, and whether it's a mandatory situation, or
10 it's a standard optional situation where it can be shown that
11 they comply with that portion of the standard, you know, they
12 practice that portion of the standard, and that's the sort of
13 testing that we are able to do, we can see what comes out of a
14 box and goes into another box.

15 THE COURT: So, in the charts that you have right now,
16 do you identify where their products say that they purport to
17 comply with the particular standards?

18 MR. MCANDREWS: Your Honor, that would -- and we had
19 this discussion, and we actually had this discussion with the
20 defendants.

21 We asked them, do you want us to go simply go through
22 and cite your data sheets?

23 Because that's what we have from them. We have data
24 sheets that say this product is compliant with, and it's not
25 just, you know, g.993.2 --

1 THE COURT: Right, I saw that in the --

2 MR. MCANDREWS: -- you know, version whatever, and
3 that's a very specific standard.

4 And then we -- and then, of course, that standard has
5 sections; some mandatory, some optional -- and we can point to
6 the sections that are mandatory.

7 There is some debate over that. We didn't know that --

8 THE COURT: But when it says it's complaint with the
9 standard, and we've got seven mandatory sections, presumably,
10 six of them are irrelevant to the claim chart, right?

11 MR. MCANDREWS: Potentially, there's -- there's many
12 sections that are irrelevant to the claim chart, correct.

13 MR. DAY: Your Honor, may I weigh in?

14 THE COURT: Sure.

15 MR. DAY: So Fujitsu says not only the standard section
16 you're looking at has to be mandatory, but you need to show that
17 every way to meet that standard mandatory requirement would
18 infringe, and they haven't done that either.

19 So, there's two pieces they would have to show to get
20 past summary judgment, so it's something not to forget.

21 Just showing that something says, shall, doesn't get
22 you there. You've got to show that in order to meet that, shall
23 sentence, you necessarily have to infringe the claim, and they
24 don't get that, but, again, I think we're past what's the bare
25 minimum they have to do.

1 And we're talking about what do we do to get from 32
2 patents to something that we can actually litigate?

3 What I'm suggesting is, if you -- if you make them
4 create these charts, where they map to the products, then we're
5 going to start to see what it is they're pointing to that they
6 think is infringing.

7 I suspect it's going to be a lot of the same DSL chips
8 that they'll be pointing to. And we'll see that a lot of the
9 elements have to do with DSL chips.

10 Those DSL chips will then be able to say, okay, well,
11 that one's in 20 products.

12 Now we know what the represented -- one product can
13 represent all 20 of those.

14 We can't do that today, your Honor, because we don't
15 know what it is they're pointing to, or they're not pointing to
16 anything in our products.

17 Every claim, virtually, requires a transceiver.

18 Okay. What transceiver are you talking about?

19 And that's a great example.

20 We think there is none in some of the products they've
21 accused. They think there is.

22 What is it you're pointing to?

23 If they don't know what the accusation is, and either
24 those products will fall out of the case, or we'll understand
25 that there is some difference in -- in what we both think that

1 term means.

2 That's the way to advance the case. That's the way to
3 set it up, so that we can narrow things down. Just through the
4 process, I think it will narrow down, but it will tell us what
5 we need to know on both sides, so then we can start doing things
6 like picking representative products, and narrowing the case
7 down maybe to representative claims.

8 THE COURT: Do you have anything more to say on that?

9 MR. MCANDREWS: Only that I think part of what he's
10 addressing is an outlier.

11 And we've gone over this before, and we've talked about
12 trying -- just real quick -- what he's talking about is there
13 are a few products that wound up in the case that I agree do not
14 have a transceiver in them. It's an adapter of some kind.

15 I think that that's the outlier that he's talking about
16 here. I don't think that the products that should be in the
17 case -- and there's very few.

18 We've talked about meeting, and conferring, and trying
19 to, let's go down and get rid of these few products by model
20 number that accidentally wound up in the case, where it's some
21 sort of adapter or something that actually is not a DSL
22 transmitter receiver, but -- so that's a very easy process to
23 do.

24 But if he's talking about something else, if he's
25 talking about, I need to take the DSL transceiver that that's in

1 his product, and get an electron microscope, and draw a dotted
2 line around the transistors that are involved in transmitting
3 and receiving, I don't think that's a useful process to advance
4 the case.

5 MR. DAY: Well, if that's what the claim calls for,
6 that's what they have to do to prove it up, your Honor.

7 THE COURT: All right.

8 So, Mr. Day, in your world -- and just speaking of your
9 defendant, or your client -- if they're asserting, let's say
10 Claim 1 of the first patent of the first family against -- who
11 are you, Zhone?

12 MR. DAY: Zhone.

13 THE COURT: Zhone. And they're accusing a hundred
14 products, how many claim charts should they be producing for
15 that; one, or a hundred, or somewhere in between?

16 MR. DAY: Well, I think somewhere in between.

17 They'll see -- again, we think what they're really
18 accusing are DSL chips, and it would probably be one chart per
19 DSL chip.

20 THE COURT: So how many DSL chips -- when you say "DSL
21 chips," do you have an estimate as to how many DSL -- different
22 DSL chips are involved in this?

23 MR. DAY: I don't, your Honor. We gave them a list
24 back in January, but I don't -- it's some fraction of the total
25 number, right --

1 THE COURT: A small fraction or big fraction?

2 MR. DAY: I don't know the answer to that, your Honor.

3 MR. SCHUMAN: Your Honor, this is Mr. Schuman.

4 For 2Wire there are seven different DSL chips. Five
5 from Broadcom and two from a company called Ikonos.

6 I suspect Mr. Day may have slightly more, because as he
7 described earlier, they have at AT&T side of the products also
8 in the case, but for 2Wire it would be seven charts, one per
9 distinct DSL chip.

10 THE COURT: So, Mr. Schuman, if I ordered plaintiffs to
11 produce new charts, you'd expect to get roughly seven charts for
12 each asserted claim?

13 MR. SCHUMAN: That's right, your Honor.

14 (Pause)

15 Actually, let me are clarify. I don't think the
16 plaintiff have accused each of those chips of infringing each of
17 the claims, so it would be at most seven.

18 For example if they accused -- to use your hypothetical
19 -- Claim 1, patent one, and family one, if they're asserting
20 that claim against all of the accused 2Wire products, that would
21 be seven charts.

22 But I think there's probably Claim 1 of patent family
23 two where they're only asserting it against a subset 2Wire
24 accused products, and in that case, it would only be a subset of
25 seven charts, whichever chips they're accusing.

1 And, as the Court knows from the letters, they have an
2 identification, and they verified in their interrogatory
3 responses, exactly which chip is in which 2Wire accused product.

4 THE COURT: All right.

5 So here's what I'm thinking, Mr. McAndrews.

6 I am thinking that -- I am thinking that you should
7 amend your infringement contentions to map the products to the
8 claims.

9 You know, maybe part of that mapping involves, maybe a
10 large part of it involves the standards, but I think that would
11 -- seems to me like that would materially advance things.

12 And, so, what I would say is -- and, of course, I'm
13 only thinking about doing it for the 18 or 20 asserted for these
14 two defendants from whichever claims that you are going to be
15 getting invalidity contentions on -- that you should do
16 infringement, amended infringement contentions that, you know,
17 that actually do map them to the -- to match the accused
18 products to the asserted claims.

19 And I guess I don't necessarily have anything more to
20 -- is there a reason why you can't do that?

21 MR. MCANDREWS: So it's for each chip? So for each
22 chip?

23 THE COURT: Well, I would leave that -- you know, I
24 hear what Mr. Schuman and Mr. Day have said, and maybe it is for
25 each chip, because if the chip is what really determines whether

1 it infringes or not, and you've got the products now identified
2 by which chip is in them, and there is, you know, maybe there's
3 up to seven at least for 2Wire, and maybe a few more for -- I
4 mean, I don't know what the other two are, but I heard Mr.
5 Schuman -- and, so, that if the chip is what makes a difference,
6 then at least it seems to me just sitting here, that, yes, one
7 chart for anything that has that chip in it probably works.

8 It's kind of a hypothetical to me, or maybe theoretical
9 is more -- but that would seem to me to be reasonable, and
10 certainly that's what Mr. Schuman -- he would not be expecting
11 anything more based on what I heard him say.

12 Starting from your two weeks from now, when you decide
13 which claims you want invalidity contentions on, how long would
14 it take you to do that?

15 MR. MCANDREWS: Your Honor, it would depend the level
16 of detail that's required in the chart.

17 In large part, what is available in public information,
18 and sometimes not even available publicly, the chip vendors will
19 have a data sheet similar to the defendants having a data sheet
20 that says we comply with these standards.

21 The chip vendors will have a similar data sheet that
22 oftentimes it is publicly available, not always publicly
23 available.

24 We've gotten some chip specifications from -- from the
25 defendants. I don't think that's uniformly true.

1 And which leads me -- you know, part of the reason why
2 we're asking for follow-up documents on the infringement
3 contentions, is it's difficult for me to understand how a party
4 could be specifying a chip for their product that they're going
5 then to sell to a consumer, or AT&T, without having at least a
6 data sheet on the chip, so I don't think we uniformly have data
7 sheets from the defendants for the chips they actually put in
8 their products.

9 If we don't have those, and they're not publicly
10 available, I would have a difficult time mapping the claim to
11 the chip. I would only be able to rely on the data sheet the
12 defendant has provided that says, we complied with these
13 portions of the standard.

14 And then by extrapolation, because of the chip that
15 they have told me is in there, I would have to understand that
16 that chip complies with the standards, so that's one level of
17 the difficulty I might have here.

18 To the --

19 THE COURT: Well, so, to the extent that rather than
20 triggering this from when you specify your 18 to 20 claims --
21 and I don't know how long it's going to take for you to resolve
22 the document issues that you have with the defendants -- but if
23 you said, I really need to get those documents, and I could be
24 pretty persuaded that that should be the starting point, or, you
25 know, whichever -- whichever is second, either when you specify

1 the 18, or when they provide the documents that you've asked
2 for, that Mr. Day seems to at least indicate could be provided
3 if you talk to each other.

4 MR. MCANDREWS: So, from the date that we receive the
5 documents for a particular chip, this is, potentially, a lot of
6 paper.

7 THE COURT: I appreciate that.

8 MR. MCANDREWS: With a -- with a lot of repetition
9 simply because largely it's going to be taking a chip that says
10 we comply with the standard, and, again, mapping it to the
11 standard.

12 THE COURT: Map it to the claim.

13 Use the standard as support for your mapping, right?

14 MR. MCANDREWS: Correct. But if we're talking about --
15 so there's mapping the claim to the standard, and then a product
16 says, I am standard complaint, in other words, mandatory, right?

17 So that's one issue in the -- and I don't mean to
18 rehash that -- but then I haven't heard this, but I think what
19 -- the only thing that's going to satisfy them is, if I take
20 third-party discovery, I get the source code from the chip
21 vendor, I isolate the sections of the source code that carry out
22 that mandatory portion of the standard, and I then point to
23 that.

24 Your Honor, that process will take -- I can't say,
25 because I don't have that discovery yet.

1 THE COURT: Well, I mean, you don't have the source
2 code from the vendors, and, so, I don't think -- even though I
3 don't recall now that Mr. Day said otherwise -- I mean, one of
4 the issues you raised is, I don't know what source code I need,
5 so to speak.

6 I think if you have to map it out and say, here's where
7 I need some source code from a vendor, that will help focus on
8 what source code you're going to need down the road, right?

9 MR. MCANDREWS: Correct, correct.

10 THE COURT: So I'm not, necessarily, myself imagining
11 that these amended contentions are -- do -- after doing the
12 third-party discovery so much as part of the process for
13 figuring out how to do sensible third party discovery.

14 MR. DAY: That's fine, your Honor, as long as they're
15 pointing to things in our products.

16 If the answer to it one element is, well, something on
17 that chip must do what's called for here, that advances the
18 ball, because then we know they need to go talk to whoever made
19 that chip.

20 But if all we're going to get is a rehash of what we
21 already have, the standard calls for this, and, therefore, you
22 must have it, that doesn't advance the ball at all.

23 I think at a minimum we would ask that they identify
24 actual things in our products.

25 THE COURT: Well, I mean, part of doing this is, you

1 provided whatever technical specifications you provided, data
2 sheets, I don't know what, you know, there ought to be some
3 reflection of the information you provided in these amended
4 contentions, right, Mr. McAndrews?

5 MR. MCANDREWS: Your Honor, yes, we can do that. Yes,
6 we can do that.

7 I consider that in part to be gathering of evidence,
8 and that's not what initial infringement contentions are for,
9 but I agree that if --

10 THE COURT: Well, I think we're beyond initial now,
11 right?

12 MR. MCANDREWS: I agree. I agree.

13 And, so, at this stage if the parties believe, and the
14 Court believes that collecting evidence, you know, per chart is
15 going to advance the case, then we will do that.

16 THE COURT: Well, I mean, I think it is, because I do
17 think it's going to, you know, because my preferred way of doing
18 this would negotiations between the parties, who are a lot more
19 confident at this than me, in terms of trying to figure out how
20 to make this into something that could actually be resolved down
21 the road, and, so... but I do think we're past -- we're
22 definitely past the initial infringement contentions.

23 And, you know, to -- I mean, I think Mr. Day says he's
24 expecting, so, therefore, I'm expecting to, that there's going
25 to be -- and this might not be your characterization of it --

1 but there's going to be -- well, I would say the fair
2 characterization is, it's going to indicate things where there
3 needs to be discovery done, but it's also going to reflect the
4 information you've already gotten.

5 I mean, so with that in mind, what kind of time frame
6 do you want?

7 MR. MCANDREWS: Assuming we can -- I guess once we
8 receive a certification that we have received all of the chip
9 specifications in their possession --

10 THE COURT: And by "certification," you just mean some
11 interrogatory or Request for Production saying, here it is,
12 here's what we've got, right?

13 I noticed this, I'm figuring this is a Chicago thing or
14 something, because it's not a language that I usually hear.

15 What do you mean by "certification"?

16 MR. MCANDREWS: Well, that they're not going to all of
17 a sudden show up at trial with, oh, well, here's the chip
18 specification --

19 THE COURT: Okay.

20 MR. MCANDREWS: -- and it says we don't infringe.

21 THE COURT: So, basically, you want a representation
22 through discovery, or letters from counsel, or something.

23 All right.

24 I understand that. How much time?

25 MR. MCANDREWS: I'd like 90 days, but the starting

1 line, your Honor, would be in addition to receiving these
2 documents, I would like to have at least -- at least one
3 deposition, because --

4 THE COURT: One deposition of whom or what?

5 MR. MCANDREWS: Of each -- one 30(b)(6) deposition of
6 each defendant. And, you now, I can't think of all the topics
7 right now, but it would be -- so what Mr. Day is representing is
8 that there's a chip, and then, you know, saying what the
9 defendants are essentially representing is that there's a chip
10 that does DSL in their product, and to them it's a black box.

11 I would like to know how much they know about that
12 black box, and what additional functionality they lay on top of
13 that, in terms of, for example, there are products that have two
14 DSL chips in them. And those two DSL chips may have to
15 coordinate one to the other. That coordination is more likely
16 to be -- and I may learn differently -- but it's more likely to
17 be something they do know about, and there's a possibility that
18 coordination is where the infringement lies, rather than in the
19 chip.

20 I think largely we'll find that the element of the
21 claim map to the chips, that that is not universally true, so I
22 would like to have one round of depositions to figure out what
23 additional information may be --

24 THE COURT: Do you have any objection to that?

25 MR. DAY: No, your Honor.

1 THE COURT: Ms. Rader?

2 MS. RADER: I don't have an objection, but I don't
3 think it's likely to be fruitful with respect to that topic.

4 THE COURT: Okay. Well, Mr. Schuman, do you have
5 anything to say?

6 MR. SCHUMAN: I don't have any objection, your Honor,
7 as long as it's not the first of three or four 30(b)(6)
8 depositions.

9 So, no, I'm okay, and discovery's been open, and the
10 plaintiff could have taken that deposition at any time. If they
11 want to take that now, that's fine. It's got to be subject to
12 the usual rules that they need good cause for multiple 30(b)(6)
13 depositions.

14 THE COURT: All right.

15 Well, I'm not going to -- whatever the rules are, is
16 what the rules are -- but it does seem to me that there's a
17 very reasonable chance, based on what I've heard that the
18 plaintiff will have a pretty decent chance of being able to
19 cover some of the same ground a second time, because I think
20 this is -- you know, most of the time in the 30(b)(6)'s I see
21 are near the end of the case. This is really the beginning of
22 the case in terms of depositions, or anything like that.

23 So, even though from what I'm -- I mean I'm also
24 hearing it could very well be that Mr. McAndrews has some
25 topics, and you'll produce your knowledgeable witness, and maybe

1 that will be sufficient on the topic. I just can't tell.

2 So, in any event, basically, I would like Mr. McAndrews
3 to come up with his actually 30(b)(6) topics, and for you all to
4 try to expeditiously get a 30(b)(6) deposition per defendant.

5 So 90 days from when the deposition is taken?

6 MR. MCANDREWS: Yes, your Honor, that's sufficient.

7 MR. DAY: For each party, your Honor --

8 THE COURT: For each party.

9 MR. DAY: -- so 90 days after the --

10 THE COURT: Right, right. If yours is -- if you take
11 them two weeks apart, somebody will be two weeks ahead, or
12 behind.

13 All right.

14 What else can we address?

15 I have something else I have to do at 1:15, and I have
16 to eat lunch before then.

17 MR. DAY: Maybe just setting another conference, your
18 Honor?

19 THE COURT: Well, I can do that.

20 Mr. McAndrews?

21 MR. MCANDREWS: I have nothing further, your Honor.

22 THE COURT: All right.

23 Well, so, when would you see us setting a conference?

24 MR. DAY: I would think after the 120 plus 14 days when
25 we give them invalidity contentions.

1 THE COURT: How about 150 days from now?

2 MR. DAY: Yes, that's likely to be after all this stuff
3 gets done, so...

4 THE COURT: All right.

5 That's kind of what I'm thinking is the two weeks and
6 the -- I'm thinking, particularly, from Mr. McAndrews, who has
7 more flexibility in the schedule that he's just set forth
8 himself, because he has got these 30(b)(6) depositions, but it
9 would seem to me that if both sides are trying, that's something
10 that ought to be able to done in 45 days.

11 And, so, 150 days from now is five months, does that
12 takes us to November or December?

13 Let's see.

14 (Pause)

15 It's October.

16 All right.

17 What about -- it's not exactly five months -- but what
18 about Monday, October 19th?

19 MR. DAY: Your Honor, that works for me. Not Monday is
20 better for travel.

21 THE COURT: Well, the only reason is, I have on my
22 calendar here the 3rd Circuit conference, so I don't know
23 exactly when -- that starts on Tuesday at some point.

24 But I'm pretty sure, actually, I could do it Tuesday
25 morning, October 20th, if you wanted?

1 MR. DAY: That's better for travel.

2 MR. MCANDREWS: That works for us.

3 THE COURT: Ms. Rader?

4 MS. RADER: That works for ZyXEL.

5 THE COURT: Mr. Schuman?

6 MR. SCHUMAN: That works fine. Thank you, your Honor.

7 THE COURT: Okay. Why don't we say October 20th at
8 9:00 a.m.

9 And, again, if you could send me letters by October
10 16th, which is a Friday, just ideally a joint status report, but
11 you can also send individual letters, or whatever, but somehow
12 or other, give me advanced, or give me a head's up as to how
13 things are going, all right?

14 MR. DAY: Yes, your Honor.

15 MR. MCANDREWS: Yes, your Honor.

16 THE COURT: Okay. Is there anything else?

17 (No response.)

18 THE COURT: All right. Thank you.

19 I will try, when we do this in October, not to ask all
20 the same questions again, but you may have to remind me in the
21 letters that I should read the transcripts of the prior
22 conferences.

23 All right.

24 Well, thank you very much.

25 Good day, Mr. Schuman.

1 MR. SCHUMAN: Thank you, your Honor.

2 THE COURT: All right.

3 Have a good afternoon.

4 MR. DAY: Thank you, your Honor.

5 MR. MCANDREWS: Thank you, your Honor.

6 MS. RADER: Thank you, your Honor.

7 (The proceedings adjourned at 12:45 o'clock p.m.)

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